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European Union's Arms Control Regime and Arms Exports to China: Background and Legal Analysis

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European Union's Arms Control Regime and Arms Exports to China: Background and Legal Analysis

Summary

In recent months, discussions have been held within the European Union (EU) on the question of lifting the embargo on arms exports to the People's Republic of China that was imposed on China on June 27, 1989. The prospect that the EU would lift its embargo on arms exports to China has led to a number of on-going discussions between EU member states and the United States government, which strongly opposes such an action at this time on human rights and security issues grounds. Key nations within the European Union, particularly France and Germany, strongly support lifting of the embargo. And, the United Kingdom has advised the Bush Administration that it will also support lifting the embargo when the subject is formally addressed by the EU, most likely during the spring of 2005.

The Council of the EU has stated that if the arms embargo on China were to be lifted, that action should not result in either a quantitative or qualitative increase in EU arms exports to China. The United Kingdom has argued that it believes that the European Union's Code of Conduct on Arms Exports, while not legally binding on EU members, with some enhancements, would provide a solid safeguard against worrisome arms exports by EU states to the Chinese in the future.

The President and senior members of the Bush Administration have lobbied the European Union to keep the arms embargo on China in place. Many Members of Congress share the Bush Administration's concerns about an end to the EU arms embargo. On February 2, 2005, the House of Representatives passed H. Res. 57, a resolution strongly urging the EU not to lift the embargo, by a vote of 411-3. Other Congressional actions on the issue may be taken.

This report provides detailed background and legal analysis of the nature of the current European Union embargo on arms exports to China. It also provides detailed background on the European Union's current Code of Conduct on Arms Exports. A strengthened version of the Code would be one of the control mechanisms that would remain should the EU lift the embargo on arms exports to China. This report also gives information on recent EU arms exports authorized for China. It further summarizes U.S. concerns regarding the lifting of the arms embargo, and notes the prospective timing of EU action on the embargo issue. This report may be updated should events warrant.

Contents

Introduction 1
General Background on European Union Embargoes 2
European Union's Arms Embargo on China 3
European Union's Arms Exports Regime 5
European Union Code of Conduct on Arms Exports: Background and Assessment 6
Arms Exports Authorized for China by European Union Member States . . . 8
United States Concerns 9
Status of European Union Action 11

Appendix 1
European Union Code Of Conduct On Arms Exports 13

Appendix 2
Brief descriptions of EU Common Military List Categories 19

European Union's Arms Control Regime and Arms Exports to China: Background and Legal Analysis

Introduction

In recent months, discussions have been held within the European Union (EU) on the question of lifting the embargo on arms exports to the People's Republic of China that was imposed on China on June 27, 1989. Following the lead of the United States, the European Union took this action in the wake of the June 4, 1989 crackdown on Chinese citizens by the Chinese military in Tiananmen Square in Beijing and the serious infringement of human rights in China that followed. The prospect that the EU would lift its embargo on arms exports to China has led to a number of on-going discussions between EU member states and the United States. The United States government continues to maintain its own arms embargo against China and the U.S. strongly opposes lifting the embargo at this time on human rights and security issues grounds. Key nations within the European Union, particularly France and Germany, strongly support lifting of the embargo. And, the United Kingdom has advised the Bush Administration that it will also support lifting the embargo when the subject is formally addressed by the EU, most likely during the early spring of 2005. All 25 members of the EU must agree before the arms embargo can be lifted.[1]

The Chinese have been seeking a lifting of the arms embargo arguing that it is discriminatory. They note that other nations deemed pariahs, such as Sudan or North Korea, do not have such an embargo imposed on them. The Chinese also view lifting of the embargo as an important symbolic political act by the EU, as they see the embargo as a Cold War era relic, and thus an impediment to better relations with European Union members. France, Germany, and other EU members claim the embargo hinders stronger EU political and economic relations with China. After their December 16 and 17, 2004 meeting, EU leaders pledged to address lifting the

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[1]"Germany: Schroeder Calls for EU to End China Arms Embargo," *Dow Jones International News*, December 6, 2004; "France reiterates support for end to China arms embargo," *Agence France Presse*, December 6, 2004; "EU arms embargo on China probably lifted within six months; Britain;" *Associated Press*, January 19, 2005; Barry Schweid, "Britain's Straw, Rice Differ on China Arms," *Associated Press*, January 24, 2005. The French Defense Minister, Michele Alliot-Marie, has argued that lifting the EU arms embargo against China could be a beneficial step because "China is rapidly developing its industry, and today our experts say in five years China could make exactly the same arms that we have today. And they will do it if they cannot import. So maybe if we sell them arms, they will not make them. And in five year's time they will not have the technology to make them." Peter Spiegel and John Thornhill, "France urges end to China arms embargo," *Financial Times*, February 15, 2005.

embargo.[2] The Council of the EU noted that if the arms embargo on China were to be lifted, that action should not result in either a quantitative or qualitative increase in EU arms exports to China.[3] The United Kingdom has argued that it believes that the European Union's Code of Conduct on Arms Exports, while not legally binding, would, with some enhancements, provide a solid safeguard against worrisome arms exports by EU states to the Chinese in the future.[4] Meanwhile, as the President and Bush Administration officials have lobbied the European Union to keep the arms embargo on China in place, many in Congress have also expressed strong concerns and support for that position. On February 2, 2005, the House of Representatives passed H. Res. 57, a resolution strongly urging the EU not to lift the embargo, by a vote of 411-3. Other Congressional actions on the issue may be taken.

This report provides detailed background on the nature and history of the current European Union embargo on arms exports to China. It also provides detailed background on the European Union's current Code of Conduct on Arms Exports. The EU plans on issuing a strengthened Code, which would be one of the control mechanisms that would remain should the EU lift the embargo on arms exports to China. This report also gives information on the level of recent EU arms exports authorized for China. It further summarizes U.S. concerns regarding the lifting of the arms embargo, and notes the prospective timing of EU action on the embargo issue.

General Background on European Union Embargoes

Arms embargoes fall within the sanctions or restrictive measures imposed by the European Union against third countries. In general, EU embargoes are either adopted to implement UN Security Council resolutions acting under Chapter VII, or are "autonomous." In the latter case, embargoes are legally founded in a specific provision of the treaties establishing the European Union. EU members have full jurisdiction to decide on imposing arms trade restrictions.[5] Prior to 1992, decisions

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[2]Marcus Walker, Marc Champion and Scott Miller, "EU Maintains China Arms Embargo–Pressure to Lift Ban Grows as States Risk Defying U.S. to Cultivate Economic Ties," *Wall Street Journal Europe*, December 9, 2004, p. A1; Daniel Dombey and Peter Spiegel, "Why Europe is ready to lift its weapons ban on China," *Financial Times*, February 9, 2005; Mure Dickie, Guy Dinmore, Daniel Dombay, Kathrin Hille, Demetri Sevastopulo and Peter Spiegel, "The EU's ban on selling military equipment to Beijing lacks credibility but Washington believes any change would be irresponsible," *Financial Times*, February 10, 2005; Peter Sparaco and Robert Wall, "Chinese Checkers; Widening business opportunities drive EU's review of China arms embargo," *Aviation Week & Space Technology*, December 13, 2004, p. 37.

[3]Council of the European Union, 16/17 December 2004. Presidency Conclusions. 16238/1/04 REV 1, p. 19. Published February 1, 2005.

[4]"Straw defends lifting of China arms ban," *Guardian Unlimited*, January 21, 2005; Daniel Dombey, "EU Finalizes plan to lift arms embargo on China," Financial Times, February 3, 2005, p. 4. Marc Champion, "EU Aims to Calm U.S. Arms Fears–Officials say likely end to Sales Embargo on China won't increase imports," *Asian Wall Street Journal*, February 21, 2005, p. A1.

[5]Article 296 of the Treaty Establishing the European Community. Available at (continued...)

on embargoes were made by the member states through an informal political process, the so-called European Political Cooperation.[6] In several instances, member states convened as a body, the European Council, adopted declarations to impose embargoes.[7] Within such a context, the embargo on China was imposed in 1989, by the then twelve members of the European Community, the EU's precursor. The objective was to introduce arms trade restrictions against the regime in China in reaction to the killing of demonstrators in Tiananmen Square.

The introduction of the Common Foreign and Security Policy (CFSP) by the Treaty on European Union (Maastricht Treaty), effective in November 1993, altered the procedural basis for EU embargoes. Decisions to impose an embargo still require unanimity among EU member states, but such decisions are now based on Common Positions, rather than declarations.[8] Often, implementing regulations are also adopted. Members are required to conform with the provisions or regulations and Common Positions. Both instruments contain a detailed description of the type of material covered as well as the terms and conditions of implementation by the member states. Arms embargoes are also subject to EU standards on arms exports, such as the 1998 Code of Conduct on Arms Exports (hereafter the EU Code). Consequently, in the implementation of the arms embargo on China, EU members are expected not only to abide by the restrictions on arms trade on China but also with the EU requirements on arms exports. Ultimately, what a given embargo entails may be viewed differently by different member states. And, as a political statement by the European Union, the EU Code on Arms Exports is not legally binding on the EU member states.

European Union's Arms Embargo on China

On June 27, 1989 the European Council, convened in Madrid, agreed to impose an arms embargo on China. The entire text of the embargo, which is in the form of a political declaration, is rather brief. In the first two paragraphs, it condemns the repression in China and requests that the Chinese authorities cease executions and respect human rights. The fourth paragraph contains the measures agreed by the members states. These include the suspension of military cooperation and high-level contacts, reduction of cultural, scientific and technical cooperation programs and prolongation of visas to Chinese students. The specific wording of the arms restrictions on China calls for: "...interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China."[9]

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[5](...continued)
[http://europa.eu.int/eur-lex/lex/en/treaties/index.htm]

[6]It refers to the informal network of communication and cooperation on foreign policy issues among the governments of the EC Member states, between the period of 1970-1992.

[7]External Relations, Common Foreign & Security Policy (CFSP), Sanctions. Available at:[http://europa.eu.int/comm/external_relations/sfcp/sanctions].

[8]Decisions are made based on articles 12 and 15 of the Treaty on European Union. Available at [http://europa.eu.int/eurlex/lex/en/treaties/index.htm]

[9]Conclusions of the European Council, adopted in Madrid on June 27, 1989, available at (continued...)

The declaration does not clarify the meaning of the term "military cooperation" nor does it contain a list of arms that come within the scope of the phrase "trade in arms." Neither does it contain exceptions or review clauses. By contrast, other EU embargoes imposed later in the CFSP context are more elaborate and specific in their scope and coverage. For instance, the Burma/Myanmar embargo, which was first adopted in 1991, has been updated and revised a number of times due to the lack of progress in democratization and continuous violation of human rights, and appears as a Common Position, which is binding. It contains, *inter alia*, a ban on technical assistance related to military activities and the provision, maintenance and use of weapons and ammunition, paramilitary equipment and spare parts.[10]

The arms embargo against China has not been interpreted uniformly by the EU members since it was imposed. This has been attributed to several factors, including lack of specificity in the political declaration, absence of a legally binding document, such as a Common Position, as is the case with subsequent embargoes imposed on other countries and, more importantly, the existing loopholes and weak points in the EU arms control system. For instance, the UK interpreted the embargo in a narrow manner, as to include the following items: lethal weapons such as machine guns, large-caliber weapons, bombs, torpedoes and missiles; specially designed components of the above, and ammunition; military aircraft and helicopters, vessels of war, armored fighting vehicles and other weapons platforms; and equipment which might be used for internal repression.[11] The French have interpreted the embargo similarly.[12]

Since 1989, European non-governmental organizations have reported that the embargo on China has been bypassed by several EU members and has been reduced to a mere "symbolic instrument."[13] One arms trade expert with the Stockholm International Peace Research Institute (SIPRI) of Sweden has stated that "many European licenses for the arms trade are actually issued for material which, on paper, can be used for civilian purposes; what is known as 'dual usage'… The embargo has actually been circumvented in this way for years."[14] Amnesty International in its 2004 report, *Undermining Global Security: the European Union Arms Exports*, contains several examples of EU members that have made exports to China within the

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[9](...continued)
[http://www.eurunion.org/legislat/Sanctions.htm#China].

[10]Common Position 2004/423/CFSP and Council Regulation (EC) No. 798/2004 Renewing the Restrictive Measures in Respect of Burma/Myanmar and repealing Regulation No. 1081/2000.

[11]Robin Niblett, The United States, the European Union, and Lifting the Arms Embargo on China, 10 EURO-FOCUS no. 3 (Sept 30, 2004). Center for Strategic and International Studies. See also: Amnesty International. *Undermining Global Security: The European Union Exports*, at [http://web.amnesty.org/library/index/engact300032004]

[12]EU arms embargo on China. [http://projects.sipri.se/expcon/euframe/euchiemb.htm]

[13]Thijs Papot, "'A Symbolic Instrument'" the EU's arms embargo against China," *Current Affairs*, January 25, 2005.

[14]Ibid.

framework of the existing arms embargo.[15] For instance, the United Kingdom exported components for Chinese military aero engines as well as technology, software and related systems for weapons platforms; an Italian joint venture company was involved in the manufacture of vehicles reportedly used as mobile execution chambers in China. In addition, the German Deutz AG diesel engines were incorporated into armored personnel carriers that were transferred to China.[16]

European Union's Arms Exports Regime

To place in context any potential actions European Union members may take with respect to the Chinese arms embargo, it is important to understand the general EU regime on arms export controls. The following EU instruments apply to arms embargoes and arms exports in general: (1) the 1998 European Code of Conduct on Arms Exports, a non-binding instrument, which lays down minimum standards to be applied on export licenses[17]; (2) Regulation (EC) No 1334/2000 setting up a Community Regime for the Control of Exports of dual-use items and technology;[18] and (3) Common Position 2003/468/CFSP on the Control of Arms Brokering.[19] The EU Code of Conduct, analyzed in detail below, establishes eight criteria to be applied by EU members on the exports of conventional arms, including software and technology.[20] A Common List of Military Equipment was agreed upon in 2000 and updated recently.[21] In general, arms embargoes, unless specific guidance is otherwise provided, cover at least all the items included in the Common List.[22] Regulation No 1334/2000 as amended (whose scope extends to any items that could be used for civilian and military purposes) is directly applicable to the member states. Under its provisions, Member states grant authorizations for exports, called Community general export authorization (CGE) of dual–use items. Such authorizations are valid throughout the Community, subject to certain specific cases for which consultation is needed among EU members prior to granting or denying an authorization. The items and technology listed in Annexes I, II and IV of the Regulation are based on

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[15]Amnesty International. *Undermining Global Security: The European Union Exports.* Available at [http://web.amnesty.org/library/index/engact300032004]

[16]Press Release of Coalition of European NGOs including Saferworld, Oxfam, Pax Christi, and Amnesty International: "Flimsy Controls Fail to Prevent EU Countries Selling Arms to Human Rights Abusers." September 30, 2004. The text of this document can be found at [http://web.amnesty.org/library/index/ENGACT300152004]

[17]Adopted by the Council of the European Union on June 8, 1998.

[18]2000 O.J. (L159) 1

[19]2003 O.J. (L156) 79

[20]Article XXI of GATT allows the imposition of trade restrictions on arms exports and imports and military equipment and those imposed by the UN Charter VII resolutions.

[21]List included in the Council Declaration of June 13, 2000. It was issued on the occasion of the adoption of the common list of military equipment covered by the EU Code of Conduct on Arms Exports, 2000 O.J. (C 191).

[22]See Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, at 17, available at EU Council Website, CFSP Section.

the lists prepared by the international export control regimes. The Regulation includes a "catch-all" clause which allows controls on goods not included in the Annex of the Regulation. Under this clause, EU members have the discretion to impose or not to impose controls on export and technology not listed in the Regulation. The objective of Common Position, 2003/468/CFSP, is to control arms brokering[23] in order to prevent circumvention of UN, EU, or Organization for Security and Co-Operation in Europe (OCSE) embargoes on arms exports and the criteria established in the EU Code. Under its provisions, Member states are urged to put in place legal norms for lawful brokering activities, including obtaining a written authorization prior to engaging in arms brokering and to keep records for at least 10 years.[24]

European Union Code of Conduct on Arms Exports: Background and Assessment

The European Union (EU) Code of Conduct on Arms Exports was adopted on June 8, 1998, during the Presidency of the United Kingdom.[25] The EU Code sets up eight criteria for the export of conventional arms and a denial notification procedure obligating EU member states to consult on possible undercutting arms sales one EU state might make even though another EU state has chosen not to make a comparable arms export. Under this procedure, member states are required to transmit through diplomatic channels information on licenses refused and reasons for the denial. Thus, before a member state authorizes a license which has been refused by another member state for the same transaction, it is necessary to consult the state that rejected the license in the first place. If the member state decides to issue the license, it must inform the state that refused to grant authorization.[26]

The EU Code's eight criteria, which are to be utilized by EU members when reviewing license requests and making decisions whether or not to make an arms export, can be briefly summarized as follows:

(1) Consistency of export with the exporter's international commitments arising from UN, EU, or OSCE arms embargoes;
(2) Risk that export would be used for internal repression or where the recipient country has engaged in serious violations of human rights;
(3) Risk that export would provoke or prolong armed conflicts;
(4) Risk of recipient using export to undermine regional peace and security;
(5) Effect of export on defense and national security interests of friends and allies;

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[23]Regarding arms brokering, the Wassenaar Arrangement should be noted. In December 2003, a group of conventional arms exporting Member states agreed to establish national legislation to control the activities of those engaged in the brokering of conventional arms. [http://www.wassenaar.org/docs/]; See EU Common Position 2003/468/CFSP, adopted June 8, 1998 by the Council of the European Union.

[24]2003 O.J. (L156) 79

[25]The full text of the European Union Code of Conduct on Arms Exports is in Appendix 1.

[26]See Fourth Annual Report According to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, 2002 O.J. (C319) 1.

(6) Commitment of purchaser to fight terrorism and uphold international law;
(7) Risk of diversion to third parties or to a terrorist organization;
(8) Risk that export would undermine the sustainable development of the recipient country.

It is important to emphasize that these eight criteria, and the EU Code on Arms Exports in its entirety, are political statements by the European Union, and *not legally binding* on the member states of the EU, although the Code is supposed to represent a moral imperative that EU member states are expected to uphold and enforce. Nevertheless, no matter how strong the language of purpose and intent contained in the Code's eight Criteria is, the 12 Operative Provisions of the EU Code–the sections of the Code which set out the manner in which the Code is to be carried out–contain significant loopholes which militate against it being a strong regime, in its current form, for the control of conventional arms exports from EU member states. This circumstance is illustrated by the following examples:

1. While each EU member state is to review export license applications made to it on a "case-by-case basis" against the eight specific criteria in the EU Code, Operative Provision 3 of the Code expressly states that "The decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State." Thus, each EU member state is free to make an arms sale based on its own determination regarding whether it is appropriate or not.[27]

2. Operative Provision 10 provides additional guidance to member states in application of the EU Code. It states: "It is recognized that Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the above criteria." A literal reading of that sentence could mean that those who adopted the EU Code recognized that national economic or commercial interests would weigh importantly in the decision-making process regarding any given arms sale, and may even trump the larger stated EU-wide interest in restricting problematic arms exports. Yet in the same sentence the provision effectively states that while national economic self-interest may compel a member state to sell, that state is expected not to do so to remain true to the principles of the EU Code.

3. A major oversight mechanism within the EU Code is Operative Provision 8, which requires that a *confidential* annual report is to be circulated by each EU member state to the other EU states dealing with its defense exports and its own implementation of the Code. These reports are to be discussed at an annual meeting of the member states where the operation of the EU Code is reviewed, and any "improvements" to it can be recommended to the EU Council. Subsequently, a

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[27]Operative provision 6 of the EU Code states that the criteria in the Code and the consultation procedure provided for in the Code shall apply to "dual-use goods as specified in Annex 1 of Council Decision 94/942/CFSP as amended, where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country." As with sales of military equipment, the decision to grant or not grant a license for the sale of "dual-use" equipment is left to each EU nation to decide on its own.

public report is produced based on the submissions of individual EU members. However, the complete details of *actual arms exports* made by EU states are not set out in this public document, although the published annual reports made pursuant to Operative Provision 8 of the Code do provide *values of arms export licenses* issued, and values of deliveries made, if available, by the exporting country. A supplier list is also provided, giving a total of sales denials made, but not what *specific* weapon sale was denied, nor to whom. Individual states are free to give as much or as little detail in their national reports as they choose. Most have taken a minimalist approach. Furthermore, individual states have different arms trade licensing, data collecting and reporting practices, thus calling into question the accuracy of some of the data provided in the annual public report. In the most recent EU annual report on the Code, the Sixth, covering calendar year 2003, categories of military systems are indicated in the data tables. Yet this standardized reporting is still not universal among member states, given the varied export licensing systems and practices individual countries currently employ.[28]

Arms Exports Authorized for China by European Union Member States

The European Union has published official documents which provide general data regarding the total values of EU member states' arms exports licenses to China. Some countries provide the total values of actual exports. There is no uniformity in this reporting across the membership of the EU. As noted above, these annual reports are made pursuant to Operative Provision 8 of the EU Code. The most recent two reports provide data for calendar years 2002 and 2003 (the Fifth and Sixth reports respectively). What follows are the data from those reports for *arms export licenses* for China as approved by named EU countries in rank order of their license values, together with the total license values of the European Union as a whole.[29]

CY2002: Total value of export licenses approved for China (expressed in Euros):
France–105,431,246
United Kingdom–79,500,000
Italy–22,836,976
Austria–2,025,925
All European Union countries–209,794,157

CY2003: Total value of export licenses approved for China (expressed in Euros)
France–171,530,641
Italy–127,128,192
United Kingdom–112,455,000
Czech Republic–3,610,819

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[28]For details of individual EU member state arms data reporting practices see generally: Sibylle Bauer and Mark Bromley. The European Union Code of Conduct on Arms Exports: Improving the Annual Report. SIPRI Policy Paper No. 8. November, 2004. Stockholm International Peace Research Institute, found at [http://www.sipri.org/contents/armstrad/PP8]

[29]2003 O.J. December 31, 2003 (C320) 9, 14, 30, 42. The Sixth report is found at Official Journal C 316, December 21, 2004 pp. 001-215.

Germany–1,096,261
All European Union countries–415,820,913

In the Sixth annual report, made in accordance with Operative Provision 8, the EU for the first time breaks down the export data by EU Common Military List category.[30] So, for those states whose licensing systems categorize their arms export licenses in detail, it is possible to get a sense of what general types of military equipment are being licensed. These data do not provide information on EU members' transactions involving dual-use equipment and items–and there is no publicly available official source that provides details on such transactions. This EU report does cover the broad spectrum of military equipment licensed for export by the European Union of EU Common Military List categories. See Appendix 2 for a detailed descriptive summary of these EU Military List categories. This descriptive list uses an abbreviation scheme whereby a number is attached to a specific category of military equipment, and this number/category is given in the license data table to indicate the value of licenses granted for sales of that specific category. For example, ML10 is: "'Aircraft,'" unmanned airborne vehicles, aero-engines and "'aircraft'" equipment, related equipment and components, specially designed or modified for military use."

The United Kingdom provides no detailed breakdown of its licenses in the Sixth report since the way its standard export licenses are valued in its licensing system currently preclude this. The same is true for Italy, and the Czech Republic. However, France and Germany are able to break down the categories of their licenses for purposes of the EU report. The data in the report indicate that the largest share of French license approvals for China in 2003 were in categories ML11– electronic military equipment (98.5 million Euros), ML10–aircraft and related equipment (45.4 million Euros), and ML15–imaging or countermeasure military equipment (24.1 million Euros). In the case of Germany, its largest share of license approvals for China in 2003 were in categories ML14–specialized military training equipment or simulators (528 thousand Euros), ML11–electronic military equipment (433.1 thousand Euros), and ML21–software for items controlled in the EU Common Military List (134.4 million Euros).

Thus, most of the arms exports authorized for China by EU members have been made by France, the United Kingdom and Italy. The Czech Republic, Austria, and Germany granted substantially smaller valued licence approvals.

United States Concerns

As the European Union has moved towards lifting the existing embargo on arms exports to China in recent months, significant emphasis has been placed by some EU members on the proposition that the European Union's Code of Conduct on Arms Exports, with additional modifications, would be a more effective control device than the existing embargo on arms exports to China. At the same time, some EU members have argued that ending the existing arms embargo on China would acknowledge that some progress has been made in China since the 1989 Tiananmen

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[30]Ibid.

Square actions that originally led to the embargo. The U.S. Government, however, remains skeptical that a strengthened EU Code would provide an effective deterrent to increased arms sales to China.

The United States' objections to the lifting of the European Union's arms embargo on China center on three major concerns. First, the United States is concerned that China would use EU member state weapons or weapons technology to enhance the capability of China's military by providing them with items they could not obtain elsewhere, including from their principal arms supplier, Russia, or from other non-EU suppliers, such as Israel. Such items could include electronic warfare equipment, command and control systems and technology, advanced communications equipment, radar, sonar, avionics, and fire control systems. Advanced air-to-sea and air-to-ground missiles might also be obtained. A number of the above items could contain advanced, state-of-the-art technology which could be used to upgrade existing Chinese air and naval weapons systems. Should China obtain high technology items such as these from EU sources, the United States military operating in Asia could face a notably increased threat from the Chinese military as they conduct their operations in areas close to China and to Taiwan, a capability China has been pursuing in recent years. Second, the United States is concerned that through EU arms exports, China could secure sufficient enhancement of its military equipment and capabilities that it could be emboldened to seriously threaten Taiwan in its continuing dispute over Taiwan's political status. Such an event could increase Sino-U.S. tensions and increase the prospects of a military confrontation between the two countries. Third, the United States believes that China has not seriously addressed the human rights violations against its own people since the 1989 Tiananmen Square events, and therefore, the arms embargo should not be lifted until significant steps to improve human rights in China have taken place.[31]

The President and senior Bush Administration officials have made such arguments to the European Union membership. During Secretary of State Condoleezza Rice's European trip in February 2005, Secretary Rice stated, on February 9, that with respect to the arms embargo, that "human rights concerns need to be taken into consideration in any decision that was tied to Tiananmen," noting that the status of the 2,000 Tiananmen prisoners had not been resolved. She added that she had "made clear our concerns about the military balance, the fact that there are still American forces in that region, and about the need to be concerned about the transfer of technology that might endanger in some way that very delicate military

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[31]Robert J. Saiget, "China will upgrade technology if EU lifts arms embargo," *Agence France Presse*, December 15, 2004; *Agence France Presse*, December 17, 2004, "EU leaders hint at June date for lifting China arms ban;" Joe McDonald, "End to European ban could make little difference to China's arms ambitions," *Associated Press*, February 7, 2005; John Rossant and Dexter Roberts, "An Arms Cornucopia for China? Europe will probably lift its embargo, but companies will be careful what they sell," *Business Week*, February 21, 2005, p. 26; Eric Schmitt. "Rumsfeld Warns of Concern About Expansion of China's Navy," *New York Times*, February 18, 2005, p. 9; Daniel Blumenthal and Thomas Donnelly. "Feeding the Dragon, Hurting the Alliance," *Washington Post*, February 20, 2005, p. B5.

balance."[32] The U.S. House of Representatives had earlier raised such concerns through passage of H. Res. 57 on February 2, 2005, in which the House strongly urged the EU not to lift the arms embargo on China. During his European trip, on February 22, 2005, President Bush noted that "[T]here is deep concern that a transfer of weapons [to EU states] would be a transfer of technology to China, which would change the balance of relations between China and Taiwan...." The President stated that European leaders had informed him that they could develop a "protocol" that could address U.S. concerns. He added..."whether they can or not, we'll see." The President also said that when the Europeans settled on the new code of conduct, they would have to "sell it to the United States Congress."[33] Senator Richard Lugar, Chairman of the Senate Foreign Relations Committee, in a press interview noted the implications of not addressing Congressional concerns on the issue, reportedly stating: "The technology the US shares with European allies could be in jeopardy if allies were sharing that through these commercial sales with the Chinese." He further said that if the lifting of the EU arms embargo on China resulted in such a diversion, he would support restrictions on sales of American arms technologies to Europe.[34]

Status of European Union Action

Based on the directive given to the Luxembourg Presidency of the EU during the European Council meetings on December 16 and 17, 2004, the EU expects to review a report on the issue of lifting the Chinese arms embargo during the first half of 2005, and could address the matter as early as March 2005 at the meeting of the European Council scheduled for that month. A formal EU decision is not expected until May or June 2005. Since the European Council has already stated its "political will to continue to work towards lifting the arms embargo," the prospects of it doing so when the issue is formally addressed are high.[35] What is not clear, should the EU lift the Chinese arms embargo, is what will be the nature and scope of "the revised

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[32]Transcript of remarks by Secretary of State Condoleezza Rice at February 9, 2005 news conference with European Commission President Jose Manuel Barroso. Federal Document Clearing House. CIA Director Porter Goss and Vice-Admiral Lowell E. Jacoby, DIA Director, in testimony before the Senate Select Committee on Intelligence on February 16, 2005 both took note of Chinese military modernization efforts, which they concluded were affecting the military balance of power in the Taiwan Strait. This modernization effort, they said, was improving the capabilities of China's military to threaten U.S. forces in the region, as well as its capability to take military action against Taiwan, should China choose to do so. Statements at the committee's website: [http://intelligence.senate.gov]

[33][http://www.whitehouse.gov/news/releases/2005/02/print/20050222-3.html] gives text of President Bush's press conference of February 22, 2005 in Brussels at NATO headquarters; Elisabeth Bumiller , "Bush Voices Concern on Plan to Lift China Arms Embargo," *New York Times*, February 22, 2005, p. A1, A10; For House debate on H.Res. 57 see Congressional Record, February 2, 2005, pp. H299-H303 [daily edition]. The full text of H. Res. 57 is at page H299.

[34]Edward Alden and Demetri Sevastopulo, "Lugar makes threat on EU arms sales to China," *Financial Times*, February 21, 2005.

[35]Council of the European Union, 16/17 December 2004. Presidency Conclusions. 16238/1/04 REV 1, p. 19. Published February 1, 2005.

Code of Conduct, and the new instrument on measures pertaining to arms exports to post-embargo countries"–what is referred to by the EU as the "Toolbox." The details of any such changes to the Code of Conduct will not be known until the EU announces them. Internal consultations among EU members on this question are continuing. What is reasonably clear is that the issue of lifting the EU embargo on Chinese arms has become a contentious issue in U.S–EU relations and could have important implications for future cooperation between the U.S. and EU member states in the military sphere, if the U.S. becomes convinced that military technology shared with EU nations could end up being transferred to China in a post-embargo period.

Appendix 1
European Union Code Of Conduct On Arms Exports

(adopted on 8 June 1998)
by
COUNCIL OF THE EUROPEAN UNION[36]

BUILDING on the Common Criteria agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992,

RECOGNIZING the special responsibility of arms exporting states,

DETERMINED to set high common standards which should be regarded as the minimum for the management of, and restraint in, conventional arms transfers by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency,

DETERMINED to prevent the export of equipment which might be used for internal repression or international aggression or contribute to regional instability,

WISHING within the framework of the Common Foreign and Security Policy (CFSP) to reinforce cooperation and to promote convergence in the field of conventional arms exports,

NOTING complementary measures taken against illicit transfers, in the form of the EU Programme for Preventing and Combating Illicit Trafficking in Conventional Arms,

ACKNOWLEDGING the wish of Member States to maintain a defence industry as part of their industrial base as well as their defence effort,

RECOGNIZING that States have a right to transfer the means of self-defence, consistent with the right of self-defence recognized by the UN Charter,

HAS DRAWN UP the following Code of Conduct together with Operative Provisions:

CRITERION ONE
Respect for the international commitments of Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations.

An export licence should be refused if approval would be inconsistent with, inter alia:

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[36]Source: Council of the European Union, European Union Code of Conduct on Arms Exports, document 8675/2/98 Rev 2, Brussels, 5 June 1998.

(a)the international obligations of Member States and their commitments to enforce UN, OSCE and EU arms embargoes;

(b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;

(c) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;

(d) the commitment of Member States not to export any form of anti-personnel landmine.

CRITERION TWO
The respect of human rights in the country of final destination.

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will:

(a)not issue an export licence if there is a clear risk that the proposed export might be used for internal repression.

(b)exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU;

For these purposes, equipment which might be used for internal repression will include, inter alia, equipment where there is evidence of the use of this or similar equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with paragraph 1 of the Operative Provisions of this Code, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

CRITERION THREE
The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

CRITERION FOUR
Preservation of regional peace, security and stability.

Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

When considering these risks, Member States will take into account inter alia:

(a)the existence or likelihood of armed conflict between the recipient and another country;

(b)a claim against the territory of a neighboring country which the recipient has in the past tried or threatened to pursue by means of force;

(c)whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient;

(d)the need not to affect adversely regional stability in any significant way.

CRITERION FIVE
The national security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries.

Member States will take into account:

(a)the potential effect of the proposed export on their defence and security interests and those of friends, allies and other Member States, while recognizing that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;

(b)the risk of use of the goods concerned against their forces or those of friends, allies or other Member States;

(c)the risk of reverse engineering or unintended technology transfer.

CRITERION SIX
The behavior of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.

Member States will take into account inter alia the record of the buyer country with regard to:

(a)its support or encouragement of terrorism and international organized crime;

(b)its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;

(c)its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of Criterion One.

CRITERION SEVEN
The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

(a)the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;

(b) the technical capability of the recipient country to use the equipment;

(c) the capability of the recipient country to exert effective export controls;

(d)the risk of the arms being re-exported or diverted to terrorist organizations (anti-terrorist equipment would need particularly careful consideration in this context).

CRITERION EIGHT
The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

Member States will take into account, in the light of information from relevant sources such as UDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

OPERATIVE PROVISIONS

1.Each Member State will assess export licence applications for military equipment made to it on a case-by-case basis against the provisions of the Code of Conduct.

2. The Code of Conduct will not infringe on the right of Member States to operate more restrictive national policies.

3. Member States will circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused. The details to be notified are set out in the form of a draft pro-forma set out in the Annex hereto. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it will first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it will notify the Member State

or States issuing the denial(s), giving a detailed explanation of its reasoning. The decision to transfer or deny the transfer of any item of military equipment will remain at the national discretion of each Member State. A denial of a licence is understood to take place when the Member State has refused to authorize the actual sale or physical export of the item of military equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order.

4. Member States will keep such denials and consultations confidential and not use them for commercial advantage.

5. Member States will work for the early adoption of a common list of military equipment covered by the Code of Conduct, based on similar national and international lists. Until then, the Code of Conduct will operate on the basis of national control lists incorporating where appropriate elements from relevant international lists.

6. The criteria in the Code of Conduct and the consultation procedure provided for by paragraph 3 of these Operative Provisions will also apply to dual-use goods as specified in Annex 1 to Council Decision 94/942/CFSP ([37]), where there are grounds for believing that the end-user of such goods will be the armed forces or internal security forces or similar entities in the recipient country.

7. In order to maximize the efficiency of the Code of Conduct, Member States will work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports.

8. Each Member State will circulate to other Member States in confidence an annual report on its defence exports and on its implementation of the Code of Conduct. These reports will be discussed at an annual meeting held within the framework of the CFSP. The meeting will also review the operation of the Code of Conduct, identify any improvements which need to be made and submit to the Council a consolidated report, based on contributions from Member States.

9. Member States will, as appropriate, assess jointly through the CFSP framework the situation of potential or actual recipients of arms exports from Member States, in the light of the principles and criteria of the Code of Conduct.

10. It is recognized that Member States, where appropriate, may also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the above criteria.

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[37](1)OF L 367, 31.12.1994, p. 8. Decision as last amended by Decision 98/232/CFSP (OJ L 92, 25.3.1998, p. 1).

11. Member States will use their best endeavors to encourage other arms exporting states to subscribe to the principles of the Code of Conduct.

12. The Code of Conduct and Operative Provisions will replace any previous elaboration of the 1991 and 1992 Common Criteria.

ANNEX
Details to be notified

..... [name of Member State] has the honor to inform partners of the following denial under the EU Code of Conduct:

Destination country: .....
Short description of equipment, including quantity and where appropriate, technical specifications: .....
Proposed consignee: .....
Proposed end-user (if different): .....
Reason for refusal: .....
Date of denial: .....

Appendix 2
Brief descriptions of EU Common Military List Categories[38]

ML1 Smooth-bore weapons with a caliber of less than 20 mm, other arms and automatic weapons with a caliber of 12,7 mm (caliber 0,50 inches) or less and accessories, and specially designed components therefor.

ML2 Smooth-bore weapons with a caliber of 20 mm or more, other weapons or armament with a caliber greater than 12,7 mm (caliber 0,50 inches), projectors and accessories, and specially designed components therefor.

ML3 Ammunition and fuze setting devices, and specially designed components therefor.

ML4 Bombs, torpedoes, rockets, missiles, other explosive devices and charges and related equipment and accessories, specially designed for military use, and specially designed components therefor.

ML5 Fire control, and related alerting and warning equipment, and related systems, test and alignment and countermeasure equipment, specially designed for military use, and specially designed components and accessories therefor.

ML6 Ground vehicles and components.

ML7 Chemical or biological toxic agents, "tear gases", radioactive materials, related equipment, components, materials and "technology"

ML8 "Energetic materials", and related substances.

ML9 Vessels of war, special naval equipment and accessories, and components therefor, specially designed for military use.

ML10 "Aircraft", unmanned airborne vehicles, aero-engines and "aircraft" equipment, related equipment and components, specially designed or modified for military use.

ML11 Electronic equipment, not controlled elsewhere on the EU Common Military List, specially designed for military use and specially designed components therefor.

ML12 High velocity kinetic energy weapon systems and related equipment, and specially designed components therefor.

ML13 Armored or protective equipment and constructions and components.

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[38] See OJ C 314 of December 23, 2003 for the full EU Common Military List. Sixth Annual report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports. Official Journal C 316, December 21, 2004 pp. 1-215.

ML14 Specialized equipment for military training or for simulating military scenarios, simulators specially designed for training in the use of any firearm or weapon controlled by ML1 or ML2, and specially designed components and accessories therefor.

ML15 Imaging or countermeasure equipment, specially designed for military use, and specially designed components and accessories therefor.

ML16 Forgings, castings and other unfinished products the use of which in a controlled product is identifiable by material composition, geometry or function, and which are specially designed for any products controlled by ML1 to ML4, ML6, ML9, ML10, ML12 or ML19.

ML17 Miscellaneous equipment, materials and libraries, and specially designed components therefor.

ML18 Equipment for the production of products referred to in the EU Common Military List.

ML19 Directed energy weapon systems (DEW), related or countermeasure equipment and test models, and specially designed components therefor.

ML20 Cryogenic and "superconductive" equipment, and specially designed components and accessories therefor.

ML21 "Software" specially designed or modified for the "development", "production" "use" of equipment or materials controlled by the EU Common Military List.

ML22 "Technology" for the "development", "production" or "use" of items controlled in the EU Common Military List, other than that "technology" controlled in ML7.